

Commentary by André Klip on the Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) or at Any Other Bank in Sierra Leone

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Freezing of assets

In this decision Judge Thompson refuses to order the freezing of the assets of accused Norman pending trial. There are basically two reasons given for this decision. The first is that there is no explicit provision in the basic documents of the Special Court and the second is that the nexus between the targeted assets and criminal conduct or illegality is lacking. I was not convinced by the arguments that support the decision.

Whether the Special Court may freeze assets

The Prosecution in its motion relied on Article 15 of the Special Court Agreement, 2002, Ratification Act, Rules 47 (H) (i), 54, 104 and 105 of the SC RPE as well as on case law of the ICTY.¹ Judge Thompson finds that these provisions do not give an explicit legal basis for measures of freezing assets, but are limited to forfeiture in cases in which a person is convicted. The question is whether such an order requires an explicit basis as for instance can be found in Article 93, paragraph 1, sub k, of the Statute of the International Criminal Court.

It is logical that when the law of the Special Court provides for forfeiture as a final measure, it will also provide for freezing as a provisional measure. This is an inherent logic of the law, as was also recognised by the ICTY.² If one would wait until conviction, there might nothing be to confiscate anymore.³ This lies at the reasoning for every international instrument on the freezing and confiscation of assets.⁴ On the same basis as the ICTY did so, the Special Court could have based such an order on the general power of Rule 54 SC RPE. It is remarkable that in citing the Milosevic decision, Judge Thompson did not mention that ICTY Judge Hunt discussed the question whether Rule 54 ICTY RPE could already be used in cases in which the accused was still at large. This suggests that in a situation, as in this case, in which the accused is in

¹ ICTY, Decision on Review of the Indictment and Application for Consequential Orders, *Prosecutor v. Milosevic, Milutinovic, Sainovic, Ojdanic and Stojiljkovic*, Case No. IT-99-37-I, Judge Hunt, 24 May 1999, Klip/ Sluiter ALC-III-35.

² The decision notices that there was only one decision relating to the freezing of assets, see par. 9. To my knowledge, no other similar applications have been lodged with either ICTY or ICTR.

³ See also the doubts expressed by Sluiter in his commentary to the Milosevic decision in Klip/ Sluiter ALC-III-48, footnote 31.

⁴ See for instance the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, European Treaty Series no. 141, that distinguishes between provisional and final measures. See also the European Union Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Official Journal of the European Union 2003, L 196/45.

detention, there can be no dispute about the applicability of Rule 54.⁵ That this is in the spirit of the drafters of the law of the Special Court can be adstruced by the Co-operation Agreement between the International Criminal Police Organization-Interpol and the Special Court for Sierra Leone, which provides in Article 2 that information will be exchanged “ with regard to assets and any asset – or fugitives-tracking activities Interpol may be involved in.”⁶

The decision fails to identify in the end what the legal basis for freezing orders is. That is astonishing given the criticism of Judge Thompson with regard to the legal bases the Prosecutor indicated. All of a sudden from paragraph 11 onwards the decision follows a track in which a freezing order is possible, but the question merely is whether it fulfils the applicable test.

Whether there is a nexus between the assets and crime

Since I am unaware of the evidence presented before the Special Court I am unable to judge whether the decision corresponded with the facts. However, a few words with regard to the test imposed are necessary. The requirement is that “there is clear and convincing evidence that the targeted assetst have a nexus with criminal conduct or were otherwise legally acquired. (...) Neither probable cause nor mere suspicion or speculation will suffice.”⁷ This is a test that seems to impose a threshold that is equal to a conviction. Thus, it imposes a standard much too high for a provisional measure. In doing so, the decision seems to be based on Rules 104 and 105 SC RPE, which can be used when convicting an accused. That may be exactly the desired applicable standard.

⁵ The Special Court RPE do not contain a provision, like Rule 61 (D) ICTY RPE to freeze assets in the case of a failure to execute an arrest warrant.

⁶ Agreement published on the Special Court’s website.

⁷ Decision, par. 13.